SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 446

LEONARD GAMAGE, *Petitioner,*

v.

HAROLD BROWN, SECRETARY OF THE AIR FORCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this action which became effective on May 23, 1967.

Opinions Below

The United States District Court for the District of Columbia filed a memorandum opinion (R. 137) [1] which is not reported but is printed in Appendix A hereto. The opinion of the Court of Appeals is reported at 377 F.2d — (C.A. D.C., 1967) and is printed in Appendix B hereto.

[1] Record references are to the pages of the Joint Appendix filed in the Court of Appeals and are designated in this petition as "(R. —)". Nine copies of the Joint Appendix have been filed for use by the Justices.

Jurisdiction

The Court of Appeals issued its opinion and order on March 30, 1967. A timely petition for rehearing was denied *per curiam* on May 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

This case raises three questions that merit review by this Court. They are:

1. Whether at an administrative hearing, required by statute to be "fair", an Air Force Board of Inquiry may receive into evidence, over timely objections, *ex parte* statements severely impeaching the credibility of the petitioner and bearing, in a highly incriminatory manner, upon all the charges of alleged "moral or professional dereliction" of which the Board subsequently found him guilty, thereby forcing his retirement from the active list?

2. Whether an Air Force regulation purporting to afford petitioner the "right to question any witness brought before the Board" was violated when, over objection, *ex parte* testimony of principal adverse witnesses, which was not subject to cross-examination, was used against him?

3. Whether the Court of Appeals ignored Rule 52(a) of the Federal Rules of Civil Procedure when it supplanted a district judge's finding based upon the parties' stipulation of material facts that the Board had permitted the introduction of *ex parte* written statements of principal accusing witnesses who were not made available for cross-examination by petitioner with its own finding that there "were available" to the petitioner "important additional procedures for seeking a form of cross-examination" of these witnesses, which "he knowingly failed to employ"?

Statute and Regulation Involved

The statute (10 U.S.C. 8791 *et seq.*) and the Air Force regulation (AFR 36-2 *et seq.*) involved are printed in Appendix C hereto.

Statement of the Case

1. *The Air Force's Investigation of the Petitioner.* At the time the Air Force instituted the proceedings out of which this case arose, petitioner had served in the Air Force honorably, and with distinction, for nearly 20 years (R. 24-25). On March 20, 1960, petitioner was relieved of his assignment as commanding officer of the Weather Detachment at Mather Field, California, on the basis of allegations made by subordinates in the Weather Detachment that he had caused the falsification of official documents, including weather forecasts and reports, and had failed to supervise subordinate personnel properly (R. 112). The investigation of these charges was conducted by Air Force inspectors during March 23-29, 1960 (R. 113). The inspectors interviewed only Weather Detachment personnel. They did not interview or question any of the operational personnel at Mather Field, that is, the flying units which used the weather forecasts and reports supplied to them by the Weather Detachment under petitioner's command (R. 32-33). The inspectors took sworn, *ex parte* testimony without notice to the petitioner. The Air Force inspectors instructed each *ex parte* witness not to talk about the testimony he had given, advising that it was confidential and not to be discussed (R. 60, 81, 96, 98).

2. *The Charges of Moral and Professional Dereliction Brought By the Air Force.* On January 29, 1963, nearly three years after it had begun its investigation, the Air Force instituted proceedings against the petitioner, pur-

porting to do so under authority provided by 10 U.S.C. 8791 *et seq.* These statutory provisions were enacted by the Congress in 1960.[2] They provide for the separation or involuntary retirement of officers from the active list of the Regular Air Force, on grounds of "moral or professional dereliction", or when necessary "in the interests of national security . . ." The alleged moral derelictions on which the Air Force relied in requiring that petitioner show cause why he should be retained on the active list included charges: that he had coerced subordinate personnel to fabricate official records (R. 43); that he had caused the falsification of official records, primarily weather reports (R. 44); and that he "gave false testimony" when he denied such charges during the course of the Air Force investigation (R. 45).

At the time the Air Force instituted charges of "moral or professional dereliction" against the petitioner, other statutory provisions, also enacted by the Congress in 1960 at the same time it passed the provisions now codified in 10 U.S.C. 8791 *et seq.*, authorized the Secretary of the Air Force to separate, or force the retirement of, an officer from active service if he was unable to rebut the claim that "his performance of duty has fallen below standards prescribed by the Secretary . . ." 10 U.S.C. 8781 *et seq.*[3] The charges which the Air Force brought against the petitioner also would have furnished grounds for initiation of court-martial proceedings.[4]

3. *Proceedings Before the Board.* On February 7, 1963, the petitioner acknowledged receipt of a copy of the charges and the Air Force's investigative file of some 660 pages,

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[2] 74 Stat. 393; 10 U.S.C. 8791.

[3] 74 Stat. 391; 10 U.S.C. 8781

[4] See, *e.g.*, 10 U.S.C. 907 (falsification of records); 10 U.S.C. 931 (perjury); and 10 U.S.C. 933 (conduct unbecoming an officer and gentleman).

containing approximately 285 separate documents, among which were copies of the sworn statements taken secretly by the Air Force from several adverse witnesses in March of 1960 (R. 33, 115). In early April of 1963, the petitioner was given the names and addresses of potential witnesses, including the names and addresses of five *ex parte* witnesses, who had already given secret, sworn testimony against him (R. 116). On June 13, 1963, and again on August 1, 1963, prior to the hearing before the Board of Inquiry, petitioner's trial counsel wrote to request that the Recorder of the Board obtain the presence of a number of witnesses, including four of the adverse *ex parte* witnesses. In his letters, counsel stated that he wished the adverse witnesses to appear at the Board hearing and that he regarded *ex parte* affidavits or statements as inadmissible unless the persons who gave them were made available for cross-examination at the hearing or through examination on deposition (R. 118). By this time, 1963, the four adverse *ex parte* witnesses whose presence at the hearing had been requested by petitioner were no longer in the Air Force. One resided in Texas, another in Wisconsin, and two, one of whom was a retired officer, lived in California. The fifth adverse witness was an Air Force major, then on active duty in England (R. 116).

Beginning on August 8, 1963, the Recorder for the Board of Inquiry sent telegrams, letters, or both, to the five adverse *ex parte* witnesses, requesting, in the name of the President of the Board of Inquiry, that they appear and testify at the hearing. All declined, the last refusal through a letter which reached the Recorder on or about August 17, 1963, two days before the hearing began (R. 120). There was no compulsory process by which, in 1963, either the Air Force or the petitioner could have compelled or elicited testimony under oath, either by way of affidavit, deposition

or other pre-hearing procedures, from witnesses who had declined the Board of Inquiry's invitation to attend the hearing in person.

At the hearing petitioner's trial counsel made timely, but unsuccessful, objections to the admission into evidence before the Board of the sworn deposition testimony and affidavits of five adverse *ex parte* witnesses (R. 119-120). Petitioner was found innocent of fourteen of the original charges against him (R. 126). However, he was found guilty of four categories of charges, i.e., (1) that he caused or directed the falsification of official records; (2) that he coerced one of the *ex parte* witnesses to file a false record; (3) that he threatened military personnel; and (4) that he gave false testimony when he denied these charges during the investigation. (R. 42-45, 47).

The principal evidence against petitioner was supplied by the *ex parte* witnesses. The evidence respecting the alleged falsification of records, for example, was primarily that of petitioner's *ex parte* accusers. They testified, *ex parte*, that they had falsified official records but that petitioner had told them to do so (which petitioner denied). For example, Sgt. Minga testified, *ex parte*:

> "Yes, sir. (Going over forms and laying aside). These are the fabricated ones, sir.
>
> "(Note: Four fabricated forms and the four original forms are also here)
>
> "By whom were you told to do this?
> "By Col. Gamage and Capt. Boyce. Capt. Boyce and I were told to do this.
> "Directly by Col. Gamage?
> "Yes, sir." (R. 56)

Capt. Boyce testified, *ex parte*, to the same effect (R. 71-77, 78). It was admitted falsifiers of the official records in question who testified, *ex parte*, over objection, against petitioner.

The *ex parte* statements to which petitioner's counsel had objected unsuccessfully were part of the evidence on which the Board of Inquiry relied in finding the petitioner guilty of several charges of falsifying Government records and denying under oath that he had done so and on the basis of which findings the Secretary of the Air Force thereafter removed the petitioner from the active list (R. 132).[5] The *ex parte* evidence bore on all the charges of which the petitioner was found guilty.[6] Portions of the testimony of the adverse *ex parte* witnesses also impeached petitioner's credibility, charging, *inter alia*, that: he was "a lazy, pathological liar"; who committed "outright lies in almost every phase of his duties"; and who "lies all of the time . . ." (R. 65, 80, 83). None of these statements, nor any of the testimony supplied by the five absent *ex parte* witnesses, was subject to cross-examination at any time by petitioner's counsel. The statements quoted above were given by subordinate personnel, who testified that they fabricated records at the request of the petitioner (R. 56, 71). One of them, Capt. Boyce, a retired officer, admitted that he falsified records in a manner which he hoped would incriminate the petitioner (R. 71). This same *ex parte* witness also accused petitioner of attempting to create a "very favorable impression on using agencies [i.e., the pilots who used the weather

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[5] Petitioner's active duty pay with allowances was $1,085 a month; his retired pay is $486.75 per month (R. 128).

[6] Illustrative of the challenged *ex parte* testimony are the statements printed in Appendix D hereto. All of this *ex parte* testimony is set out in the record (R. 51-104).

information] . . .", but of having no "interest in the welfare of his [Weather] personnel" (R. 80).

In contrast to the testimony supplied by his *ex parte* accusers the operating (flying) personnel who testified at the Board hearing gave very favorable testimony in petitioner's behalf, complimenting the quality of the weather service information which they had been furnished by the petitioner, as commanding officer of the Weather Detachment (R. 25-26, 29). The fliers also testified that they could discern no useful purpose for the petitioner to have caused the fabrication of weather reports. In the first place, in the judgment of the flying units which used them, his weather reports were highly accurate (R. 27). Secondly, a number of copies were made of each weather report prepared under petitioner's direction, and were simultaneously distributed to a number of bases and operating units (R. 35-37). The originals of his reports were forwarded, at the time of their preparation, to other bases, including higher commands (R. 37). These originals, however, were not produced by the Air Force at the Board of Inquiry hearing. Nor were they produced on review by the Secretary of the Air Force of the Board's decision, despite a request for their production by petitioner's counsel.

4. *Further Proceedings Within the Air Force.* The Board recommended that the petitioner be removed from the active list. On appeal, an Air Force Review Board upheld that decision. During the course of the appellate proceedings within the Air Force, California counsel for the petitioner submitted an affidavit of Dr. Paul Kirk, a nationally known handwriting expert (R. 105-110). Dr. Kirk, after examining some of the documents which the Air Force alleged the petitioner had made up or fabricated, concluded that the signature of the author of those documents was not that of the petitioner. Dr. Kirk's opinion was that they "were

written by a person other than Lt. Col. Gamage" and that "inescapably . . . these letters are forged." (R. 110).

The respondent's predecessor, after denying petitioner's petition for reconsideration, directed his involuntary retirement effective on April 30, 1964.

5. *The District Court's Decision.* In the District Court, the Air Force contended that no stigma attached to the petitioner under the circumstances of his involuntary retirement following the proceedings described in prior sections of this petition. The trial judge disagreed. He found that this was not "a case of a minor infraction," but "involves a very serious charge, namely, falsification of records." (R. 138). He observed that the "fact that there was other evidence in the case which was sufficient to sustain the charges does not change the result," since we "do not know but that the statements in question might have swung the result." The district judge expressed his opinion that "it was an error that went to the very roots of a fair hearing to introduce *ex parte* statements of witnesses which constitute part of the evidence against the plaintiff," who had been charged with "a serious dereliction . . ." (R. 138). He then granted petitioner's motion for summary judgment and denied respondent's cross motion (R. 139).

6. *Reversal By the Court of Appeals.* The Court of Appeals held, without specifying what they were, that "important additional procedures for seeking a form of cross-examination of all five persons whose statements are the subject of this dispute were available to [petitioner]."[7] Finding that the petitioner "knowingly failed to employ" these unspecified "procedural rights . . .", the Court of Appeals reversed the District Court and remanded the case for dismissal of the complaint.[8]

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[7] Appendix B, p. A10.

[8] *Ibid.*

Reasons for Granting the Writ

In reversing the District Judge's decision that an Air Force Board of Inquiry had improperly permitted, over timely objection, the use of highly prejudicial *ex parte* testimony by principal accusers leading to the involuntary retirement of the petitioner on grounds of moral and professional dereliction, i.e., the falsification of Government records and perjury, the Court of Appeals acknowledged that the facts raised "the classic case of failure of opportunity for confrontation . . ." and that the "issues involved in this case are substantial ones". In this Court, petitioner presses four claims. Any one or all of them, we believe, justify the issuance of the writ.

First, the decision of the Court of Appeals is in conflict with the controlling decision of this Court on the right of confrontation and cross-examination possessed by employees who either are forced out of Government service or denied entry to it on grounds which fasten a moral stigma upon them. *Greene* v. *McElroy*, 360 U.S. 474. Secondly, the Court of Appeals, in apparently grounding its decision on a requirement that the petitioner should have performed a patently futile act, i.e., formally requesting the pre-hearing depositions or affidavits of concededly adverse *ex parte* witnesses who had refused to come to the hearing at the invitation of the Air Force, and whose attendance, either on deposition or at the hearing, could not have been obtained by compulsory process or through any other available pre-hearing procedure, departed from the Court's ruling in *Williams* v. *Zuckert*, 372 U.S. 765. Thirdly, the Court of Appeals put aside the lesson of this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535, as well as its own holding in *Powell* v. *Zuckert*, 125 App. D.C. —, 366 F.2d 634, 640, when it failed to construe an Air Force

regulation which guaranteed petitioner the right "to question any witness brought before the board of inquiry", to permit him to cross-examine accusing *ex parte* witnesses whose prejudicial *in camera* testimony was introduced in evidence and relied on by the Board in reaching its adverse decision.

Finally, in addition to its several departures from controlling precedents of this Court in the field of federal administrative law and procedure, the Court of Appeals indulged in a particularly inexplicable failure to observe the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Civil Procedure. Wholly without support in the record, it has supplanted a contrary finding of the trial court, based on a stipulation of material facts agreed upon by the Government and the petitioner, with its own finding that there were "important additional procedures for seeking a form of cross-examination" of the adverse *ex parte* witnesses and that the petitioner "knowingly failed to employ" these allegedly available, but unidentified, procedures. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394; *Commissioner* v. *Duberstein*, 363 U.S. 278, 289-291. This procedural lapse by the Court of Appeals presents an opportunity for this Court to resolve a conflict among the Circuit Courts of Appeal as to whether the precept of Rule 52(a) may be totally disregarded in cases where a trial court's finding or inference rests upon or is drawn from stipulated or undisputed facts.[9] Compare, *e.g.*, *Lundgren* v. *Freeman*, 307 F.2d 104, 113 (C.A. 9, 1962) with *Orvis* v. *Higgins*, 180 F.2d 537, 539 (C.A. 2, 1950).

In more detail, petitioner's reasons are:

A. *The Statutory Guarantee of a "Fair" Hearing Was Not Afforded by the Air Force.* In 1960 Congress enacted

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[9] Petitioner raised this last issue in his petition for rehearing *en banc*, which the Court of Appeals denied.

the provisions now found in 10 U.S.C. 8791 *et seq.* These provide that:

> "The Secretary of the Air Force may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Air Force to determine whether he shall be required, *because of moral dereliction, professional dereliction,* or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list."[10]

The statute also requires, in 10 U.S.C. 8792(b), that a "fair and impartial hearing before a board of inquiry shall be given" each officer who is required to show cause for his retention on the active list. An officer removed under these statutory provisions may be "discharged" with severance pay, except if on the date of his removal he is eligible, as was the petitioner, for voluntary retirement, in which case he is involuntarily retired in the grade and with the pay to which he would have been entitled had he retired at his own request. 10 U.S.C. 8796(b).

Although the Court of Appeals passes over it in noncommittal silence, there is significant legislative history surrounding both the enactment of the "moral or professional dereliction" removal provisions and the enactment of the provisions now found in 10 U.S.C. 8781 *et seq.* These latter provisions permit a Secretary of one of the military departments to remove an officer from the active list where his "performance of duty has fallen below the standards prescribed by the Secretary, . . ." Removal under these particular provisions, unlike removal pursuant to 10 U.S.C. 8796, requires that the officer be either voluntarily retired or *honorably* discharged with severance benefits. 10 U.S.C.

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[10] Italics supplied throughout the petition.

8786. The combined legislative history of these two different statutory removal procedures[11] indicates that Congress regarded a removal for "moral or professional dereliction", pursuant to the procedures prescribed in 10 U.S.C. 8791, as one which placed a stigma on the officer so removed. Indeed, Air Force witnesses who testified before Congress in support of the legislation indicated that an earlier show-cause procedure had not been used to eliminate the "sub-standard officer", but was only resorted to in the case of "the man [who] had done something wrong".[12] The House committee report also took cognizance of the taint which attaches to a military officer removed on the grounds of "moral or professional dereliction".[13]

In the House, Congressman Bennett of Florida, a member of the subcommittee which considered the legislation, and the last member of the House to speak in the debate, rose to "emphasize the safeguards we included in the bill . . .", i.e., the show-cause procedure under 10 U.S.C. 8791 *et seq.*, explaining:

> "Each officer being considered for removal under the permanent part of this law [10 U.S.C. 8791, *et seq.*] is guaranteed the opportunity of a 'full and fair hearing' and a review by a subsequent and disinterested board, with final approval authority vested in the Secretary . . . *the right of confrontation and access to all evidence is guaranteed in every case except in those few instances where an officer is being considered for removal because his continued retention would en-*

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[11] Printed as Appendix E hereto are extracts from the legislative history of 10 U.S.C. 8781 *et seq.* and 10 U.S.C. 8791 *et seq.*

[12] Appendix E, pp. A19-A21.

[13] House Report No. 1406, March 17, 1960, as printed in *U.S. Code Congressional and Administrative News*, 86th Cong., 2nd Sess. (1960), p. 2870; see also Appendix E, pp. A25-A26.

danger national security. In those cases, it is specifically required that the officer be furnished a summary of any information or evidence which is withheld from him.[14]

Petitioner reads the text of the statute and its legislative history to support the following conclusions: (1) that Congress was aware that a stigma attached to an officer discharged or involuntarily retired on grounds of "moral or professional dereliction"; (2) that it intended to give the Secretaries of the three military departments a freer hand when removing the honest but inefficient officer from the active list, by permitting them to remove such officer when the performance of his duty fell below prescribed standards, without thereby subjecting him to the moral stigma or taint which attached to removal for wrongdoing under 10 U.S.C. 8791; and (3) that the "fair" hearing which Congress provided in 10 U.S.C. 8792(b) guaranteed "the right of confrontation in any case", except where an officer was being removed as an alleged security risk, in which case he would be entitled only to a summary of any evidence withheld from him.

Despite the fairly implied, if not explicit, procedural protections afforded under 10 U.S.C. 8791 *et seq.*, the Court of Appeals has sanctioned the petitioner's involuntary removal from the active list of the Air Force, after 20 years of honorable service, with the brand of forger and perjurer placed on him. Petitioner has never contended that he has any constitutional right to remain on active duty. He argues only that before he was removed for alleged "moral or professional dereliction" he had a right to the "fair" hearing which Congress first provided military officers in 1960, when it enacted 10 U.S.C. 8791 *et seq.* It is this statutory

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[14] 106 Cong. Rec. 6987 (1960).

right which the Board of Inquiry did not afford, an omission which, in the language of the trial judge, "was an error that went to the very roots of a fair hearing . . ." (R. 138).

This Court's landmark decision in *Greene* v. *McElroy*, 360 U.S. 474, is the "case which overshadows all previous case law on the right of federal employees to full hearing" on questions of discharge or removal.[15] Involved was the revocation of security clearance for access to confidential information granted to the employee of a private company which produced goods for the military services. During administrative appeals in which he protested this denial of access, the plaintiff was not permitted to confront and cross-examine confidential informants of the Government, whose *ex parte* statements were used against him. In upholding Greene's contention that this was unlawful, this Court decided in his favor, not on the basis of due process requirements, but on the ground that the statute and executive order under which security proceedings were conducted had not made explicit the intention to deny the right of confrontation and cross-examination. Specifically, said the Court:

> "In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered *after a hearing which failed to comport with our traditional ideas of fair procedure.* The type of hearing was the product of administration decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution, we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the

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[15] 1 Davis, Administrative Law Treatise (1965 Supp.), p. 171.

limits on executive or legislative authority may be. *We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross examination.*[16]

Greene v. *McElroy, supra,* should be dispositive of this case. If necessary, it could be argued that this petitioner's contentions present an *a fortiori* situation. In *Greene* v. *McElroy,* the Government was at least able to argue that important considerations of national security justified denial of the fundamental right of confrontation and cross-examination. Moreover, in the present case, the statute under consideration explicitly provides for a "fair and impartial hearing"; and its legislative history also indicates that the statutory language was intended to *assure* the right of confrontation and cross-examination, except when removal is based on security considerations. In contrast, this Court pointed out in *Greene* v. *McElroy, supra,* that neither the Congress nor the President had made "explicit" the intention to *withhold* this fundamental right.[17]

The Court of Appeals, however, attempted to avoid the force of *Greene* v. *McElroy* by assuming that the petitioner "had procedural rights (which were never accorded in the *Greene* case!) which he knowingly failed to employ."[18] There are two basic errors in this "finding" by the Court of Appeals. First, it has no support in the record. Secondly, it is fatally vague. It does not specify any alleged procedural right which the petitioner failed to pursue. We

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[16] 360 U.S., at 508.

[17] 360 U.S., at 508.

[18] Appendix B, p. A9.

believe it unfortunate that the fundamental right of cross-examination should ever be denied in the absence of the clearest waiver of that right. To approve of its denial on the basis of an attenuated finding of the type made by the Court of Appeals is to invite, in future cases, serious erosion of a right which, in our jurisprudence, is considered the indispensable support of the adversarial method for getting at the truth, whether in the judicial or in the administrative process.

The stipulated record shows, too plainly for argument, that there was no subpoena power, compulsory process or other pre-hearing procedure by which the petitioner could have obtained, either on deposition or by affidavit, the sworn testimony of his principal accusers who, three years before, had given *ex parte* testimony, not only bearing directly on all the charges of which he was later found guilty, but severely impeaching his credibility as well. The major premise, therefore, on which the Court of Appeals attempted to distinguish this case from *Greene* v. *McElroy, supra,* is purely an *ipse dixit* proposition. It is not only without support in the stipulated record, but, on the contrary, is directly contradicted by the undisputed facts, as the Government itself must concede and, indeed, did concede during argument in the courts below.

In putting *Greene* v. *McElroy* aside, the Court of Appeals noted that it did not "deal here with a criminal trial". That is true. Nevertheless, in *Greene* v. *McElroy,* and in recent subsequent reaffirmations of that decision, this Court has indicated the compelling importance which it attaches, and the wide reach it gives, to the "traditional . . . safeguards of confrontation and cross-examination". For example, in the closing days of the last Term, in *Washington* v. *Texas,* 387 U.S. —, 18 Law Ed.2d 1019, 1023, the Court stated:

"This Court had occasion *In re Oliver*, 333 U.S. 257, 92 L. Ed. 682, 68 S. Ct. 499 (1948) to describe what it regarded as *the most basic ingredients of due process of law.* It observed that:

> 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; and these rights include, as a minimum, *a right to cross examine the witnesses against him, to offer testimony,* and to be represented by counsel.'"

We draw, with some confidence, the conclusion that the right to cross-examine accusing witnesses is one of "the most basic ingredients of due process of law". The same ingredient would, therefore, appear to be an indispensable prerequisite in an adversarial hearing which Congress has required to be "fair". The omission of that indispensable ingredient by the Board of Inquiry and the Court of Appeals' sanctioning of its omission substitute form for the substance of the Congressional command and give this Court's ruling in *Greene* v. *McElroy* a severely restricted application for which we can find no justification, either in the result reached there or in the broad and moving rationale which the Court articulated in preserving the fundamental right of cross-examination in that case.

B. *There Was No Waiver.* The Court of Appeals proceeds from its major misassumption that the petitioner had available to him procedural means through which to compel sworn, pre-hearing testimony on the part of hostile, *ex parte* witnesses to reach a second, and equally erroneous, conclusion. It holds that the petitioner waived his right to utilize "important additional procedures for seeking a form of cross-examination" of these *ex parte* witnesses.[19]

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[19] Appendix B, p. A10.

Here, it cites as authority this Court's decision in *Williams* v. *Zuckert*, 372 U.S. 765. Petitioner might concede that if there had been "available" some means by which he could have compelled the sworn, pre-hearing testimony of principal accusers who already had given damning *ex parte* statements against him, and he had failed to pursue them, then *Williams* v. *Zuckert*, *supra*, would be controlling and the Court of Appeals' syllogistic reasoning unassailable. That is not this case, however.

In *Williams* v. *Zuckert*, the Circuit Court of Appeals for the District of Columbia had upheld the District Court's grant of summary judgment against a contention that a Civil Service employee's procedural rights had been denied by the failure to produce at a hearing under the Veterans Preference Act three members of the Air Force whose affidavits furnished the basis of the original charges brought against him. 111 App. D.C. 294, 296 F.2d 416. The hearing afforded in that case was not required by the Veterans Preference Act, 62 Stat. 354, 5 U.S.C. 652(a), but was provided for under a rule of the Civil Service Commission. The rule required the employee to make his "own arrangements for the appearance of witnesses". 5 C.F.R. 22.607. After granting certiorari, this Court found that the employee's request for the production of witnesses, which was made for the first time at the hearing, "was neither timely nor in conformity with the applicable regulations which contemplate that the party desiring the presence of witnesses, either for direct examination or cross-examination, shall assume the initial burden of producing them." 371 U.S. 531, 532. Williams had not objected to the use of the *ex parte* statements; his objections went only to the denial of cross-examination. Upon rehearing, however, this Court vacated the judgment of the Court of Appeals and remanded the case to the District Court, with instructions to hold a hearing in order to determine whether the employee had

complied with "the applicable regulations by making timely and sufficient attempt to obtain their presence, or, *under the circumstances* and without fault of his own, was justified in failing to make such an attempt, and, if so, whether proper and timely demand was made upon the Air Force, so that it was required to produce such witnesses for cross-examination." 372 U.S. 765.

In this case, petitioner made several timely requests in writing that the absent accusing witnesses be produced, protesting that, unless produced, their *ex parte* testimony should not be admitted in evidence (R. 118). In short, far from waiving any right to examine hostile, *ex parte* witnesses, petitioner consistently insisted that he be permitted to exercise such right! The Government conceded in the Court of Appeals that so far as the absent *ex parte* witnesses were concerned "nothing could be done about their refusal to attend." Neither the Air Force nor the petitioner could either compel these witnesses to attend the hearing, or, by 1963, when the petitioner was served with charges, to submit themselves for examination on deposition, or to provide some other form of sworn pre-hearing testimony. The record also reveals that the last of the replies from the *ex parte* witnesses refusing the Air Force's invitations to attend the hearing before the Board of Inquiry did not reach the Recorder of the Board until just two days before that hearing was scheduled to begin (R. 120). The *ex parte* witnesses at this time were scattered throughout the country (R. 116).

Williams v. *Zuckert*, *supra*, petitioner believes, reaffirms the traditional reluctance of the law to require the performance of a futile act as a condition precedent to the exercise of important procedural rights.[20] In the language of this

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[20] See, *e.g.*, the recent decision of the Court of Claims in *Hosifan* v. *United States*, 354 F.2d 358 (Ct. Cl., 1965), holding that a civil service employee need not personally invite the attendance of adversarial witnesses

Court's opinion in that case, the instant petitioner, "under the circumstances . . . was justified in failing" to pursue procedures which did not exist in order to compel testimony from *ex parte* witnesses, consisting of principal accusers, whose sworn testimony the Air Force had taken *in camera* some three years before the hearing began. And surely it is highly improbable that persons who previously had given unabashedly accusatory statements to the Air Force under oath would voluntarily submit to cross-examination under oath at the invitation of counsel for the man whom they already had accused in their sworn testimony. In light of the undisputed facts, and in view of this Court's opinion in *Williams* v. *Zuckert, supra,* petitioner is baffled by the Court of Appeals' finding that the petitioner somehow waived his right to object to highly prejudicial, *ex parte* testimony. For waiver to exist, there first must be present a right to waive. *Green* v. *United States,* 355 U.S. 184, 191. A search of this record yields not the shred of a suggestion that petitioner waived any meaningful right, otherwise available to him, to secure the sworn testimony of his principal accusers prior to the hearing at which their prior *ex parte* testimony was introduced over his objections.

C. *The Air Force Did Not Observe Its Own Regulation.* When a Government agency, including a military department, prescribes a procedural regulation, it binds the agency along with others, even where administrative action made subject to the regulation was otherwise purely discretionary in nature. *Vitarelli* v. *Seaton,* 359 U.S. 535; *Watson* v. *United States,* 355 U.S. 14; and *Service* v. *Dulles,* 354 U.S. 363. The Court of Appeals concluded that the Air Force's regulations "appear to have been followed ex-

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whom he had reasonable belief to conclude would be "unresponsive" to his invitation. There, as in the instant case, such invitation "would be simply an exercise in futility." 354 F.2d, at 363.

plicitly by the Board of Inquiry".[21] That is true, with one major, all encompassing, exception, i.e., the actual regulation at issue in the courts below, of which the Court of Appeals makes no mention in the body of its opinion. We refer to AFR 36-2, §17d which, in enumerating the procedural rights to be afforded an officer appearing before a Board of Inquiry, provides that:

> "He or his counsel may question any witness brought before the board of inquiry."

This regulation, reasonably read, would appear to imply the right to cross-examine any witness whose sworn testimony is submitted to the Board, whether at the hearing, by deposition or by affidavit. Controlling here should be *Vitarelli* v. *Seaton, supra.* There, a regulation of the Department of the Interior gave an employee, against whom security charges were brought, the "right to cross-examine any witness offered in support of the charges". A non-confidential informant gave *ex parte* information detrimental to the employee. This Court set the Secretary's removal order aside on the ground, *inter alia,* that the employee had been denied the right to cross-examine the adverse, *ex parte* witness in violation of the Department of Interior's own rule. The Court construed that rule to imply that employees had the right to cross-examine non-confidential informants "who provide material taken into consideration by the board." 359 U.S., at 534-535. In this case, it is stipulated that the damaging testimony of accusing *ex parte* witnesses was introduced in evidence before the Board of Inquiry and relied on by the Board in reaching its decision against the petitioner. The President of the Board stated, in overruling petitioner's objections to the use of the *ex parte* testimony, that its members "are entitled to every

[21] Appendix B, p. A7.

shred of evidence or information to properly consider the case of the [petitioner]" (R. 121).

The Court of Appeals never faced up to the issue of the proper construction of AFR 36-2, §17d. This may explain why it also made no reference to its earlier decision in *Powell* v. *Zuckert*, 125 App. D.C. —, 366 F.2d 634. In that case, another panel of the same court was called upon to construe a regulation of the Air Force which provided, in civilian employee discharge proceedings, that the employee had "the right to question any person . . . who testifies at the hearing . . ." AFM 40-1, AF A-12.5, §5, ¶4a. The panel there, following *Vitarelli* v. *Seaton*, *supra*, held that a civilian employee of the Air Force discharged partially on the basis of evidence presented in the form of an affidavit of an adverse witness who did not testify at the hearing had been discharged in violation of the Air Force regulation referred to immediately above. The regulation involved in *Powell* v. *Zuckert*, while not *in haec verba* with AFR 36-2, §17d, is substantially identical. If anything, it might be argued that language which permits an accused to "question any witness brought before the board of inquiry" implies a slightly broader right of cross-examination of *ex parte* witnesses than a regulation which guarantees merely "the right to question any person . . . who testifies at the hearing." Perhaps if the Court of Appeals had focused on its prior decision in *Powell* v. *Zuckert*, it might have realized how wide of the mark it was in stating that the Air Force regulations "appear to have been followed explicitly by the Board of Inquiry." Therefore, unless the Court's holding in *Vitarelli* v. *Seaton*, *supra*, was intended only to apply to civilian employees, this third independent ground also justifies the grant of certiorari in this case.

D. *The Court of Appeals Ignored the "Clearly Erroneous" Standard of Rule 52(a).* Petitioner previously

has argued the critical mistake made by the Court of Appeals in substituting for the district judge's finding that *ex parte* accusing witnesses were not made available to plaintiff for cross-examination "either by way of depositions or during the hearing", its own, but unsupportable, finding that important "additional procedures for seeking a form of cross-examination of all" the *ex parte* witnesses were available to petitioner.[22] Not only does this error go to the heart of the case, it also represents a disturbing deviation from requirements imposed by Rule 52(a) of the Federal Rules of Civil Procedure.

Rule 52(a) provides that a trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Petitioner concedes that where, as here, a case is heard on a stipulated record, with no testimony of live witnesses to evaluate, the burden which a reversing appellate court has of showing the "clearly erroneous" nature of the lower court's findings is lighter. *Galena Oaks Corp.* v. *Scofield*, 218 F.2d 217, 219 (C.A. 5, 1954). However, decisions of this Court indicate that the burden still remains in such cases, although reduced in rigidity, and also applies in reviewing "factual inferences [drawn] from undisputed basic facts". *Commissioner* v. *Duberstein*, 363 U.S. 278, 291; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395. Yet, a line of cases in several of the Courts of Appeal, apparently taking the late Judge Frank's decision in *Orvis* v. *Higgins*, 180 F.2d 537 (C.A. 2, 1950), *cert. den.*, 340 U.S. 810, and the approving comments of Professor Moore as their guide,[23] holds that where review is on a stipulated record, or involves

[22] Appendix B, p. A10.

[23] 5 Moore's Fed. Prac. 2842.

only the drawing of inferences from undisputed facts, the "clearly erroneous" rule is not applicable. *United States* v. *Kavanagh*, 308 F.2d 824, 828 (C.A. 8, 1962); *United States* v. *Mississippi Valley Barge Line Co.*, 285 F.2d 381, 388 (C.A. 8, 1960); and *United States* v. *United States Steelworkers of America*, 271 F.2d 676, 685 (C.A. 3, 1959), *affirmed*, 361 U.S. 39. The Ninth, Tenth, Sixth and Seventh Circuits, on the other hand, adhere to the position that the "clearly erroneous" test of Rule 52(a) still applies in cases where the facts are not in dispute and where review is primarily concerned with the inferences drawn from such facts by the trial court. *Lundgren* v. *Freeman*, 307 F.2d 104, 113 (C.A. 9, 1962); *Widney* v. *United States*, 178 F.2d 880, 884 (C.A. 10, 1949); *United States* v. *Allinger*, 275 F.2d 421, 423 (C.A. 6, 1960); and *Union Pacific R. Co.* v. *American Silica Sand Co.*, 243 F.2d 309, 312 (C.A. 7, 1957).

On the merits, petitioner would urge that the Court approve the view of the Tenth Circuit, as recently expressed in *Lundgren* v. *Freeman*, *supra*, namely, that the Judge Frank-Professor Moore interpretation of the inapplicability of Rule 52(a) is disproven by both the purpose of the rule and its subsequent decisional applications, including this Court's holding in *Commissioner* v. *Duberstein*, *supra*, 307 F.2d, at 113. Accordingly, whether the Court of Appeals supplanted a finding of fact by the District Court or merely substituted one inference for another, it was error for it to have done so.[24] The trial court's critical finding (or inference) was not "clearly erroneous". Rather, the Court of Appeals' substitute finding is oblivious to stipulated and indisputable facts, i.e., that there was no compulsory process

[24] There is not presented here any question of whether a trial court "applied the proper [legal] standard to essentially undisputed facts." *Cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44; *United States* v. *General Motors*, 384 U.S. 127, 141.

or other pre-trial procedures available through which the petitioner might have obtained sworn testimony under oath, either on depositions or in affidavits, from accusing *ex parte* witnesses who had given sworn testimony to the Air Force three years before when they were in military service.

Conclusion

In *Greene* v. *McElroy*, 360 U.S. 474, 497 this Court quoted with approval Professor Wigmore's famous statement:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross examination as a vital feature of the law."

This Court stated:

> "This Court has been zealous to protect those rights from erosion. It has spoken out not only in criminal cases (citing) but also in all types of cases where administrative or regulatory actions were under scrutiny. (Citing)"

The Air Force's denial of petitioner's right to confrontation and cross-examination which occurred here is no isolated injustice. The Board of Inquiry which permitted the introduction into evidence, over timely objection of the raw investigative file containing the *ex parte* accusations involved in this case was acting in precise accord with a confidential Air Force guidance manual (R. 120). It can be anticipated, therefore, that unless this Court acts, the Air Force guidance manual, and not the statutory guarantee of a "fair" hearing, will continue as the authority under which other officers will be drummed out of the active service because of alleged "moral or professional dereliction", with-

out the opportunity to confront and cross-examine their accusers.

For the reasons stated herein, this petition for writ of certiorari should be granted.

Respectfully submitted,

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August 1, 1967

APPENDIX A

OPINION OF THE DISTRICT COURT

The Court: There is no question as to the constitutionality of the statute under which the proceeding here involved was conducted.

The only question is whether the statutory requirements were complied with and that in turn depends on the definition of what constitutes "a fair and impartial hearing before a board of inquiry" as provided in 10 U.S. Code 8782, subsection (b).

The Court has no doubt that the hearing in this instance was impartial.

It is argued however on behalf of the plaintiff that the words "fair hearing" would bar the use and the introduction in evidence of ex parte written statements of accusing witnesses, for not being produced to testify orally either at the hearing or by deposition, there is no opportunity, therefore, to cross-examine.

Now it must be said at the outset that a fair hearing does not mean that all the common-law rules of evidence must be observed.

The requirement means, as the Court sees it, that the fundamentals must be observed and the Court is of the opinion that in the traditions of Anglo-American jurisprudence to find a person guilty of a serious dereliction of any kind where part of the testimony against him consists of ex-parte written statements does not constitute a fair hearing, as we use that term.

The fact that there was other evidence in the case which was sufficient to sustain the charges does not change the result.

There was evidence both ways. We do not know but that the statements in question might have swung the result.

The Court appreciates that there are practical difficulties in producing witnesses at these proceedings because there is no provision for compulsory process, although one might well believe that if Congress were requested to give such authority it would be forthcoming.

But it seems to the Court that since there was other evidence supporting the charges procured from live witnesses who were produced, the ex parte statements should have been excluded.

This is not a case of a minor infraction tried in an intramural proceeding such as Captain's Mast in the Navy or disciplinary punishment by a company commander.

This involves a very serious charge, namely, falsification of records.

The Court is of the opinion that it was an error that went to the very roots of a fair hearing to introduce ex parte statements of witnesses which constitute part of the evidence against the plaintiff.

The Court was very much impressed by the able argument of counsel for the Government. It always is, but he had a very difficult burden to carry in this case, and he carried it well.

Whatever result this Court is going to reach in this proceeding does not prevent the Air Force from bringing another proceeding and conducting it in accordance with this Court's interpretation of the statute.

In view of these considerations, the plaintiff's motion for summary judgment is granted and defendant's motion is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided March 30, 1967

Before BAZELON, *Chief Judge*, BURGER, *Circuit Judge*, and EDWARDS,* *Circuit Judge* for the United States Court of Appeals for the Sixth Circuit.

EDWARDS, *Circuit Judge:* In this case Lieut. Col. Leonard A. Gamage appeals from his compelled discharge from the active service of the United States Air Force. The Board of Inquiry which heard and sustained charges against him of falsifying weather reports accorded him an honorable discharge with retirement pay.

In the declaratory judgment proceedings brought before the United States District Court by appellee Gamage, the United States District Judge held that Col. Gamage had not been given a "fair hearing." He held the discharge to be "null and void" for failure to observe the statutory requirement of 10 U.S.C. § 8792(b) (1964), which provides for "a fair and impartial hearing before a board of inquiry."

The United States District Judge held "[T]o find a person guilty of a serious dereliction of any kind where part of the testimony against him consists of *ex parte* written statements does not constitute a fair hearing, as we use that term. . . ." He directed the Secretary of the Air Force to restore appellee to active duty.

The District Judge found no failure on the part of the Air Force to provide Gamage with an "impartial" hearing. Nor do we.

The District Judge's findings as to "unfairness" were based entirely upon the admission of statements taken by

* Sitting by designation pursuant to Section 291(a), Title 28 U.S. Code.

the Air Force, without participation of Gamage or his counsel in the taking of such statements. These statements were admitted against Gamage in the course of the hearing without the persons who had made them being produced at the hearing themselves. This, of course, raises the classic case of failure of opportunity for confrontation familiar in criminal trial proceedings. *Pointer* v. *Texas*, 380 U.S. 400 (1965).

We do not, however, deal here with a criminal trial. The hearing with which we are concerned is an administrative procedure calculated to determine the employment rights of an Air Force officer. In addition, we deal with all of the complex additional problems posed by the fact that the agency involved is one of the military services of the United States. Clearly, Gamage has no constitional right to active duty as an Air Force Lieut. Colonel. Clearly, also, we do not review this discharge against the constitutional standard of the Sixth Amendment of the United States Constitution, since by specific language it applies "in all criminal prosecutions." U.S. Const. amend. VI.

But Congress has provided by applicable statute for a "fair and impartial hearing." These words we assume should be interpreted as they were used—to apply to an administrative hearing in a military service.

Facts which are relevant to our decision include the following: Four of the five witnesses whose *ex parte* statements were introduced were retired or inactive Air Force personnel. The fifth was an officer on active duty in England at the time of the hearing. Their statements (or certainly some of them) were material to the issues posed by the charges against appellee. Eighteen witnesses were present in person and subject to cross-examination, and their testimony covered the same general charges. It is also true, however, that the testimony for appellee concededly created a dispute of fact as to these issues which the Board of Inquiry had to resolve. Clearly, the *ex parte* statements were before the Board for consideration and they could have prejudiced the result.

The statute which we are called upon to construe provides:

"§ 8792. *Boards of inquiry: composition; duties.*

"(a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Air Force may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under section 8791 of this title, shall be retained on the active list of the Regular Air Force.

"(b) A *fair and impartial hearing* before a board of inquiry shall be given to each officer so required to show cause for retention.

"(c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review.

"(d) If a board of inquiry determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 8791 of this title." Chapter 860, Title 10, U.S.C. § 8792. (Emphasis added.)

"§ 8793. *Boards of review: composition; duties*

"(a) Boards of review, each composed of three or more general officers, shall be convened by the Secretary of the Air Force, at such times as he may prescribe, to review the records of cases of officers recommended by board of inquiry for removal from the active list of the Regular Air Force under section 8792 of this title.

"(b) If, after reviewing the record of the case, a board of review determines that the officer has failed to establish that he should be retained on the active list, it shall send its recommendation to the Secretary for his action.

"(c) If, after reviewing the record of the case, a board of review determines that the officer has established that he should be retained on the active list, his

case is closed. However, at any future time, he may be again required to show cause for retention under section 8791 of this title." Chapter 860, Title 10, U.S.C. § 8793.

"§ 8795. *Rights and procedures*

"Each officer under consideration for removal from the active list of the Regular Air Force under this chapter shall be—

"(1) notified in writing of the charges against him, at least 30 days before the hearing of his case by a board of inquiry, for which he is being required to show cause for retention on the active list;

"(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Air Force, to prepare his defense;

"(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

"(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceedings, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security.

"In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld." Chapter 860, Title 10, U.S.C. § 8795.

The statute has been followed in detail by the regulations—except, of course, it may be argued that any material and disputed statement admitted without cross-examination destroys the "fairness" of any hearing.

The regulations (1957 Air Force Regulations, 36-2—See App. A) do provide for full notice of charges and of any adverse statements to be offered. They "encourage" the Board to invite material witnesses who are "reasonably available" to appear. They provide for the Air Force to require the presence of witnesses who are on active duty,

provided "military requirements permit." They provide for the Board to "invite" witnesses who are civilians or members of Reserve components, but each such witness invited is told that his expenses are not reimbursable. Section 18(d) of the Regulations also provides:

> "The legal adviser to the board may interrogate witnesses and otherwise assist the board so that the record will be as complete as possible to make sure that all pertinent information favorable as well as unfavorable to the respondent is brought to the attention of the board and made a matter of record. The legal adviser is in no way to be considered a prosecutor and will not conduct himself as one."

The Regulations appear to have been followed explicitly by the Board of Inquiry. Cf. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957).

This record discloses that the disputed *ex parte* statements were part of a lengthy file made available to appellee well before the hearing. No records were withheld from appellee. Appellee was given requested adjournments in order to prepare his defense, and the site of the hearing was transferred from Illinois to California at his request also.

Appellee was furnished with both the statements from and addresses of the five officers and men. Appellee was told that statements, affidavits and depositions which he desired to submit would not be objected to, and that the list of names "should be of assistance in contacting any potential witnesses for purposes of obtaining depositions for the Board of Inquiry." Subsequently, the Recorder of the Board of Inquiry met with counsel for appellee to discuss the availability of witnesses. No request was made for Air Force assistance in the taking of depositions, and appellee did not submit any statements, affidavits or depositions from the five parties whose statements are in dispute.

It is conceded that the only one of the five witnesses whom the Air Force could have compelled to testify (by ordering him back from England where he was stationed on active duty) was not asked for by appellee. The four

whose presence as adverse witnesses was requested by appellee were requested by the Recorder of the Board of Inquiry to appear at the hearing. Each refused. It is conceded that none of these witnesses (all retired Air Force personnel) could have been compelled to appear and testify.

At the conclusion of the hearing counsel for appellee entered in the record an acknowledgment that the Recorder "has done an excellent job, and has made a diligent effort to procure the witnesses that [appellee's counsel] requested."

In summary, as to the disputed statements from the five Air Force officers and men, appellee did not seek the presence of the only witness, Major Trevorrow, whose presence the Air Force could have compelled. He did not request assistance of the Air Force in his taking the depositions of the four other men to whose statements he objected. Nor did he offer any statements, affidavits or depositions from them as a result of direct contact with them. We note additionally that appellee makes no claim that financial or other factors rendered contact with the five officers and men an impossibility for him.

The issues involved in this case are substantial ones. If we declare that a "fair" hearing in the context of this statute requires physical presence and cross-examination at the hearing, then either Congress must amend the statute to supply the Air Force the missing subpoena power, or the Air Force may be completely deprived of testimony from retired, inactive, or discharged personnel (arguably vital in some cases). On the other hand, we are by no means unimpressed with the fact that issues of material importance to appellee's present and future standing were decided by Air Force Board of Inquiry and that Congress plainly provided that such action be taken only after "a fair and impartial hearing."

The general rule in relation to administrative hearings does not bar all hearsay. 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1964), *Vitarelli* v. *Seaton*, *supra* at 540.

The primary concern of the courts in the cases most relied upon by the appellee has been to guarantee the element of "fairness" which is involved in full disclosure of charges

and adverse statements with identification of the sources of same so that the accused could effectively prepare a defense. *Vitarelli* v. *Seaton, supra; Willner* v. *Committee on Character*, 373 U.S. 96 (1963); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

In this last case the United States Supreme Court said:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . ." *Greene* v. *McElroy, supra* at 496.

It is certain that the statute, the regulations and the procedures followed by the Board of Inquiry in this case fully matched the standards of disclosure and discovery set forth in the cases cited above.

Greene v. *McElroy, supra*, however, also stands generally for the proposition that "in the absence of explicit authorization from either the President or Congress" an administrative hearing which does not afford "the safeguards of confrontation and cross-examination" does not "comport with our traditional ideas of fair procedure." *Greene* v. *McElroy, supra* at 508. This case, of course, did not deal with the military service nor was the penalty therein imposed the retirement from active service of an officer who was accorded honorable discharge and retirement pay. Arguably, too, in the instant case (as opposed to *Greene*), there was "explicit authorization from . . . Congress" of the procedure employed by the Air Force in this hearing.

More important to our decision, however, is the fact that appellant herein had procedural rights (which were never accorded in the *Greene* case!) which he knowingly failed to employ.

In the second *Williams* case (*Williams* v. *Zuckert*, 372 U.S. 765 (1963)), the United States Supreme Court vacated a judgment of the Court of Appeals and remanded the case to the District Court for a hearing to determine "whether

the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the applicable regulations *by making timely and sufficient attempt to obtain their presence* or, under the circumstances and without fault of his own, was justified in failing to make such attempt, and, if so, whether proper and timely demand was made upon the Air Force so that it was required to produce such witnesses for cross-examination. . . .'' *Williams* v. *Zuckert, supra* at 765. (Emphasis added.)

In the order of the District Judge, there is this finding: "[T]he defendant failed to comply with the requirement of 10 U.S.C. 8792(b) in denying plaintiff a fair hearing before an Air Force Board of Inquiry, when there was introduced in evidence against the plaintiff and over the timely objection of his counsel, *ex parte* written statements of accusing witnesses who were not made available to plaintiff for cross examination, *either by way of depositions* or during the hearing.'' (Emphasis added.)

We believe the District Judge was in error in his construction of the stipulated record. Important additional proceedures for seeking a form of cross-examination of all five persons whose statements are the subject of this dispute were available to appellee. His failure to request the presence of Major Trevorrow and his failure to take depositions or statements from the other four, or to request the aid of the Air Force in arranging to take their depositions or statements, allows the inference that he was aware of the adverse nature of their testimony. Under these circumstances we cannot agree that admission of their statements deprived him of a "fair'' hearing within the meaning of the Congressional enactment under which the Board of Inquiry acted.

Reversed and remanded for dismissal of the complaint.

APPENDIX C

STATUTE AND REGULATIONS INVOLVED

1. Chapter 860, Title 10, United States Code, provides in pertinent part:

> SEPARATION FROM REGULAR AIR FORCE FOR MORAL OR PROFESSIONAL DERELICTION OR IN INTERESTS OF NATIONAL SECURITY
>
> § 8791. Selection boards: composition; duties.
>
> The Secretary of the Air Force may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Air Force to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list.
>
> § 8792. Boards of inquiry: composition; duties.
>
> (a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Air Force may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under section 8791 of this title, shall be retained on the active list of the Regular Air Force.
>
> (b) A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.
>
> (c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review.
>
> (d) If a board of inquiry determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future

time, he may be again required to show cause for retention under section 8791 of this title.

§ 8793. Boards of review: composition; duties.

(a) Boards of review, each composed of three or more general officers, shall be convened by the Secretary of the Air Force, at such times as he may prescribe to review the records of cases of officers recommended by boards of inquiry for removal from the active list of the Regular Air Force under section 8792 of this title.

(b) If, after reviewing the record of the case, a board of review determines that the officer has failed toestablish that he should be retained on the active list, it shall send its recommendation to the Secretary for his action.

(c) If, after reviewing the record of the case, a board of review determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 8791 of this title.

§ 8794. Removal of officer: action by Secretary of the Air Force upon recommendation.

The Secretary of the Air Force may remove an officer from the active list of the Regular Air Force if his removal is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive.

§ 8795. Rights and procedures.

Each officer under consideration for removal from the active list of the Regular Air Force under this chapter shall be—

(1) notified in writing of the charges against him, at least 30 days before the hearing of his case

by a board of inquiry, for which he is being required to show cause for retention on the active list;

(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Air Force, to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interest of national security.

In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

2. The 1957 Air Force Regulations 36-2 governing the Elimination or Release of Officers from Active Duty by Reason of Unfitness, Unacceptable Conduct, or Inefficiency, provided in pertinent part:

* * * * * * *

16. *Briefing the Board of Inquiry.* The major air commander or his designated representative will, before the board convenes, brief the board members regarding their responsibility to carry out the policies announced in this regulation and in the guidance manual. This briefing, among other matters, should emphasize that the show cause hearing is administrative in nature and is not subject to the rules and procedures governing court action. Further, that the case as presented to the board by the major air commander is based on a determination of a board of senior Air Force officers, or in the case of a nonprobationary Regular commissioned officer, a board of five general officers that the respondent is required, because of

failure to achieve the prescribed standards of performance, to show cause for his retention in the Air Force. The burden rests with the respondent to present evidence to refute, rebut or mitigate the evidence presented by the government.

17. *Rights a Respondent Has.* An officer appearing as a respondent before a board of inquiry will have the following rights:

a. He may present evidence and appear in person with or without counsel. If he does not appear in person, he will be represented by counsel at all open proceedings of the board of inquiry. However, he will not be reimbursed for expenses in connection with the appearance or assistance of civilian counsel.

b. He may request that any witness appear before the board of inquiry if he believes testimony of the witness will be pertinent to the case. The board will honor the request if it considers the witness to be reasonably available and his testimony can add materially to the case. However, he will not be reimbursed for expenses in connection with the appearance or assistance of civilian witnesses or military personnel not serving on extended active duty.

c. He may challenge for *cause only* any voting member of the board of inquiry.

d. He or his counsel may question any witness brought before the board of inquiry.

• • • • • • •

g. At all stages of the proceedings of the board of inquiry, he will be allowed full access to and will be furnished copies of records which the board considers relevant to his case except certain classified, medical or professional reports.

• • • • • • •

18. Conduct and Action of the Board of Inquiry:

• • • • • • •

c. The board is encouraged to invite witnesses to appear if the witnesses are reasonably available and if, in the opinion of the board, their testimony is essential or will contribute materially to the case. Whenever practical in cases involving substandard performance, arrangements will be made for the respondent's immediate commander or the individual responsible for preparing his effectiveness report (AF Form 77) to appear as a witness before the board of inquiry. The board will contact witnesses in the following manner:

(1) The president of the board will invite witnesses who are civilians or members of the Reserve components of the Air Force not on extended active duty to appear before a board. Each witness will be informed that the board cannot reimburse him for expenses incurred in connection with his appearance before the board.

(2) The major air commander concerned will, when so requested by the board and provided that military requirements permit, make witnesses available who are military persons serving on the active list or on extended active duty. Direct communication between major air commands is authorized when required. Travel of military witnesses should be limited to official military transportation. In instances where official military transportation is not available, commercial means will be used. Funds for reimbursement of travel will be provided from resources available to the major air commander. The use of affidavits or depositions to obtain testimony of witnesses who are not reasonably available is encouraged.

d. The legal adviser to the board may interrogate witnesses and otherwise assist the board so that the record will be as complete as possible to make sure that all pertinent information favorable as well as unfavorable to the respondent is brought to the attention of the board and made a matter of record. The legal adviser is in no way to be considered a prosecutor and will not conduct himself as one.

APPENDIX D

ILLUSTRATIVE EX PARTE STATEMENTS

Illustrative, but not all, of the testimony, taken without notice to the appellee and out of his presence and that of his counsel, which was received in evidence over appellee's objection by the Board of Inquiry, are the following statements:

1. "These [records] were all made up just prior to the inspector's arrival * * * Capt. Boyce and I were told to do this . . . directly by Col. Gamage." (J.A. 56).[1]
2. "Yes, sir, I have . . . been threatened . . . by Col. Gamage." (J.A. 59).[2]
3. "He (Gamage) borrowed my pen . . . to initial these [fabricated] forms." (J.A. 63).[3]
4. "My opinion of Lt. Col. Gamage is that he is a lazy pathological liar. I have several instances to cite." (J.A. 65).[4]
5. Subordinates in Col. Gamage's weather detachment command "were . . . instructed to lie for Lt. Col. Gamage . . ." (J.A. 68).[5]
6. "Lt. Col. Gamage gave me a direct order to fabricate Severe Weather Warnings and Met Watch Advisories. It is possible that the fabrication of this material was done in a deliberately careless manner to aid detection by the inspectors." (J.A. 71).[6]
7. ". . . Colonel Gamage has threatened to frame people who did not go along with him . . . [he had] bragged how he framed three enlisted men at other weather stations . . ." (J.A. 79).[7]

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[1] Sworn, *ex parte*, testimony of Sgt. Minga.

[2] *Ibid.*

[3] *Ibid.*

[4] Unsworn, *ex parte*, statement of Capt. Boyce.

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

8. Col. Gamage committed "outright lies in almost every phase of his duty." (Witness paused, threw up his hands). (J.A. 80).[8]
9. ". . . I have prepared falsified documents and records for Lt. Col. Gamage . . ." (J.A. 83).[9]
10. Col. Gamage "lies all of the time . . ." (J.A. 83).[10]
11. "The Colonel asked me first to sign these [forged records] and I refused and he told Sgt. Dalton to sign them." (J.A. 95).[11]
12. ". . . he (Gamage) [told me] he would frame them. (J.A. 100).[12]
13. "I did not question the DETCO (Lt. Col. Gamage) after finding the records had been falsified . . . at the direction of the DETCO." (J.A. 101).[13]

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[8] Sworn, *ex parte,* testimony of Capt. Boyce.

[9] Unsworn, *ex parte,* statement of Airman Ramirez.

[10] *Ibid.*

[11] Sworn, *ex parte,* statement of Airman Ramirez.

[12] Unsworn, *ex parte;* statement of Capt. William C. Trevorrow.

[13] *Ibid.*

APPENDIX E

EXTRACTS FROM THE LEGISLATIVE HISTORY OF S. 1795

A. *Hearings on S. 1795 Before a Subcommittee on the Senate Committee on Armed Services*, 86th Cong., 1st Sess., June 17, 1959:

1. At p. 29 thereof, the following exchange occurred between Senator Cannon and Charles Finucane, Assistant Secretary of Defense for Manpower, Personnel and Reserve:

> "*Senator Cannon.* Could I ask one further question that has occurred to me?
>
> "Mr. Secretary, if this bill has as its purpose the elimination of substandard officers, why can't they be eliminated under the present law under show-cause procedure?
>
> "*Mr. Finucane.* This is not a—this is not necessarily an elimination of officers that would be subject to a show-cause procedure. This is a carrying on of a program of last year's pay increase that we were going to have an officer proficiency arrangement where you could, if you wanted to, eliminate some of your weak officers without 'showing cause'.
>
> "In other words, between all humans there is a degree of effectiveness and *when you get into a show-cause, you are inferring, at least, that the man has done something wrong.** This is not aimed at that at all. The mere fact that he has been passed over twice indicates that he probably is not quite as good as somebody else who was not passed over."

2. In his statement before the Senate Committee, General Curtis LeMay, Vice Chief of Staff of the United States Air Force, said, at pp. 31-32 thereof, that:

> "The only existing law available to remove these officers prior to 28 or 30 years' service is found in

* Italics supplied throughout this appendix.

section 8781, title 10, United States Code. *The use of this authority has historically been limited in the Air Force to those cases involving substandard performance of duty or misconduct.* It is not considered appropriate for use in the case of those officers whose primary failing is their inability to keep pace in the increasingly complex environment in which they find themselves." (pp. 31-32)

3. Major General J. J. Nazzaro, Director, Personnel Planning, U. S. Air Force, advised the Senate Committee that:

"Third, the proposed law would authorize the Secretary to involuntarily retire certain permanent colonels and lieutenant colonels. Present law guarantees 28 years of service for permanent lieutenant colonels and 30 years of service for permanent colonels, unless they are involuntarily removed under section 8781 of title 10, United States Code. As has been previously mentioned *the use of this authority in the Air Force has been limited to cases involving substandard performance of duty or misconduct. It is not considered appropriate for use* in the case of officers whose primary failing is their inability to keep pace in the increasingly complex environment in which they find themselves." (P. 36)

4. Later on General Nazzaro told the Committee:

"Yet, under existing law, it is almost impossible to eliminate an officer for *other than misconduct or gross negligence.*" (p. 39)

5. In concluding his testimony, as found at p. 46 of the Senate Hearings, General Nazzaro stated:

"As General LeMay pointed out, we think it is something that will give us a better management tool than we have today. The only way we can eliminate a regular officer over 20 years involuntarily is by court martial or by title 10 of United States Code, I think section

8781, and when we do use it, applies to officers who are substandard and who are either guilty of gross negligence *or misconduct.* We do not place the officers we are discussing in connection with this legislation in the same category. *These officers are not associated with misconduct* or substandard performance." (p. 46)

B. *Hearings on S. 1795 Before the House Committee on Armed Services,* 86th Cong., 2nd Sess., March 16, 1960.

6. Congressman Kilday of Texas, Chairman of the Subcommittee, reported to the full House Committee on S. 1795. During the course of his report he noted, as found at pp. 3829 of the House Hearings, that:

> "*The stigma associated with the removal under this law. Since the majority of cases initiated under this law have involved gross inefficiency or misconduct, a definite stigma has attached to individuals removed under the law by the Air Force.* As a result, there has been a reluctance on the part of the Air Force to initiate removal action against officers whose sole deficiency has been a failure to perform their duties efficiently." (p. 3829)

7. In discussing the proposed provisions to grant authority to remove or retire officers for moral or professional dereliction, Congressman Kilday said, as found on pp. 3830, that:

> "The proposed new chapters 360 and 860 (sec. 3, p. 26; sec. 8, p. 39) will provide for the Army and Air Force, respectively, the authority to remove officers for moral or professional dereliction, or for security reasons.
>
> "The procedures for removal are similar to those proposed in the case of officers being eliminated for substandard performance of duty. *However, in view of the nature of the reasons for which removal is authorized by these chapters, the provisions differ in the following respects:*

"The officer will be informed of the charge or charges for which his removal is recommended, and is guaranteed at least 30 days' notice before the hearing.

"*With respect to officers who are being eliminated and who are not qualified for retirement, they may be discharged rather than honorably discharged* as is provided in the case of officers being eliminated for substandard performance of duty.

"General officers rather than colonels will comprise the membership of all the boards involved in this chapter." (p. 3830)

8. Testifying in support of his report, Congressman Kilday pointed out, at pp. 3832 of the Hearings, that:

"Another difficulty was that generally the existing provision had been used not to get the officer who was just substandard or perhaps he wasn't just doing everything that should be expected of a man of his grade and years of service. That fellow wasn't the one that they went after on this. *But it was the fellow that had been culpable in some respect, probably not subject to court-martial but still he had been guilty of some misfeasance or malfeasance and it wasn't just quite aggravated enough to justify a court-martial or perhaps not constituting the technical elements of an offense.*

"Well, because that has been the situation, we felt that it is not quite fair to put the man who is just a little below standard *before the same type of proceeding as the fellow who is culpable.*

"*So we have provided in this area in two separate sections: One for the man who is just substandard, and the other one who is more or less culpable. And as to the one where he is going out for cause, we have made that a good deal tighter than the other one. It is a board of general officers.*

"*Mr. Morris.* Speak just a little louder, please.

"*Mr. Kilday: I say, as to the one where it will cast a reflection on the man, we have placed more safeguards around it than we have in the other.*" (p. 3832)

9. Thereafter, an exchange ensued between Congressman Blandford and Congressman Carl Vinson, then Chairman of the House Armed Services Committee. As found at p. 3834 of the House Hearings, it reads:

"*Mr. Blandford.* This is existing law.

"*Now, the new one that is proposed, as a new chapter, involves an actual charge.*

"*The Chairman.* Charge?

"*Mr. Blandford.* Involves an actual charge, *or at least a much more specific charge.*

"And that is this:

"The Secretary of the Army——

and of course the Air Force, for its chapter——

may convene a board to review the record of any commissioned officer on the active list of the regular Army to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list.

"Now, in that connection, we require in that person's case—not only that general officers make a recommendation that he go before a board, but that general officers sit on the board. And the general officers also sit on the board of review.

"In addition, we provide that the individual who has been required to show cause why he should not be retained——

will be entitled to be notified in writing of the charges against him at least 30 days before the hearing of his case by a board of inquiry which he is being required to show cause for retention on the active list.

"Now, you cannot be any more specific than that with regard to the chapter that we are dealing with there.

"Now, in the first chapter, you are dealing with a substandard performance, which is an efficiency rating and a series of efficiency ratings.

"*The other chapter involves a moral dereliction—*

alcoholism, drug addiction, or a variety of other causes, that may bring about the reason that the Secretary will ask him to come in and to establish why he should not be removed." (p. 3834)

10. At p. 3837 of the House Hearings, the exchange continued as follows:

"*The Chairman: Anyhow, you correct it by not making it an ex parte hearing.*

"*Mr. Blandford:* Yes, sir.

"*The Chairman: He has an opportunity to defend himself.*

"*Mr. Blandford:* Yes, sir.

"*The Chairman:* And he has——

"*Mr. Blandford:* This is one——

"*The Chairman: He has his day in court.*

11. Several Congressmen inquired of Mr. Kilday concerning aspects of the proposed bill. One of these exchanges, as found at pp. 3838-39, went as follows:

"*Mr. Hardy:* Mr. Chairman, does the language that we have finally worked out here prevent the elimination of officers who might have a basis of culpability or dereliction under the other procedures?

"*Mr. Kilday:* I don't believe I understood you.

"*Mr. Hardy:* Now——

"*Mr. Blanford:* I can——

"*Mr. Hardy: We are trying to distinguish here between removal for two reasons.* One, they don't come up to the standards; *and the other is there is some dereliction involved.*

"Now, have we, in the language we used and have got worked out, provided that officers who might be subject to removal for dereliction or culpability are not simply removed under the substandard provision?" (pp. 3838-39)

C. *Senate Report No. 571*, 86th Cong., 1st Sess., July 12, 1959.

12. At p. 6 thereof the Senate Committee Report states that:

> "The Department of Defense is of the opinion that the authority which would be provided by this bill is necessary and desirable to augment existing authority and procedures. The present show-cause procedure is not always effective in reaching the marginal officer. *In addition, the show-cause procedure is associated in the minds of many officers with factors other than quality of duty performance.*" (p. 6).

D. *House Report No. 1406*, 86th Cong., 2nd Sess., March 17, 1960.

13. At p. 10 of the House Report the following appears:

> "In the testimony before the Committee on Armed Services, it was revealed that the present 'show cause' procedure which is applicable to all Regular officers regardless of rank or length of service is cumbersome and unreasonably time consuming. Likewise, while the Army has used the 'show cause' procedure for officers who have failed to meet the standards prescribed for officers of their particular rank, *the Air Force has limited its application of this portion of the law to officers who have been charged with professional or moral dereliction or are considered to be security risks. Thus, the Air Force cannot utilize this chapter for the officer who fails to meet the standards prescribed by the Secretary because of the stigma attached to the procedure.*" (p. 10)

14. At p. 12 the House Report states:

> "During the committee hearings on S. 1795 it became obvious that the Army and Air Force have experienced difficulty in eliminating officers under the 'show cause' procedure under chapters 359 and 859 of title 10. These

chapters were originally enacted as title I of Public Law 810 of the 80th Congress and were intended to provide the Army and Air Force with a means of eliminating those officers whose performance of duty did not conform to standards prescribed by the Secretary. Thus existing law has been an effective tool in eliminating those officers whose performance of duty was grossly inefficient or whose conduct was such that their retention could not be tolerated. However, it has not been effective in removing those officers whose deficiency has been an inability to perform their duties in the manner expected of Regular officers of their grade and length of service.

"The principal difficulties experienced in administering the present law are the following:" (p. 12)

15. At p. 13 the House Report notes:

"The stigma associated with removal under this law. Since the majority of cases initiated under this law have involved gross inefficiency or misconduct, a definite stigma has attached to individuals removed under the law by the Air Force. As a result, there has been a reluctance on the part of the Air Force to initiate removal action against officers whose sole deficiency has been a failure to perform their duties efficiently." (p. 13)

16. Near the end of the House Report, at pp. 24-25 thereof, the Committee explains that:

"Subsection (a) amends title 10, United States Code, by inserting a new chapter 860, 'Separation From Regular Air Force for Moral or Professional Dereliction or in Interests of National Security,' after present chapter 859. The new chapter 860 would be administered completely separately from chapter 859 and would cover cases in which it is desired to separate an officer from the Regular Air Force because of moral dereliction or professional dereliction, or because his retention is not clearly consistent with the interests of

national security. *The new chapter provides a method for the removal of those kinds of officers that will not be confused with the system set forth in chapter 859 for the removal of substandard officers, since different standards must be applied to the differing kinds of cases.*" (pp. 24-25)

E. ***Extracts From The Debate In The House of Representatives.***

17. Congressman Kilday told the House (106 Cong. Rec. 6985):

> "We are providing now for two separate Boards of Officers to be convened. We believe this will cure one of the difficulties which has been encountered under the present provision of the Code. The present provision of the Code is so worded as to apply to the officer who has fallen below the standards of efficiency which should be required of him, as well as the officer who has been guilty of some dereliction. *In practice, and because of the language used in the regulations, the existing provision has been used mostly in those cases of dereliction such as chronic alcoholism, homosexuality, addiction to drugs, and things of that kind,* so that for practical purposes when you come to the fellow who is not quite giving the performance we ought to get from a man of his rank, there has been great reluctance to bring him before the Board, because if he is thrown out, *he has the same stigma attached to him as the one who was thrown out because of some dereliction. . . .*"

18. Congressman Kilday continued (106 Cong. Rec. 6986-87):

> "We have changed this to provide two different forms of Boards, one for the fellow who falls below the required efficiency; *the other one for the one who ought to be turned out of the service, yet is not guilty enough to be court martialed for a specific crime.*"

19. Replying to the question put by Congressman Meyers as to whether an officer who is charged as a security risk is to be given "no right to see the records that the Secretary uses," Congressman Kilday answered (106 Cong. Rec. 6986):

> "I will say to the gentleman, realizing the difficult operation in this [security] field, that I think his protection is the same as it is elsewhere, except that experience seems to show that the one whose security is at least suspect becomes the hardest of all to eliminate from the service. . ."

20. Finally, Congressman Bennett of Florida closed the debate (106 Cong. Rec. 6987):

> "Mr. Chairman, as a member of the subcommittee that considered the bill, *I would like to emphasize the safeguards we included in the bill.* . ."
>
> . . . . . .
>
> "Each officer being considered for removal under the permanent part of the law [10 U.S.C. 8791, *et seq.*] is guaranteed the opportunity of a 'full and fair hearing' and a review by a subsequent and disinterested Board, with final approval authority invested in the Secretary . . . *The right of confrontation* and access to all evidence *is guaranteed in every case except in those few instances* where an officer is being considered for removal *because his continued retention would endanger national security.* In those cases, it is specifically required that the officer be furnished a summary of any information or evidence which is withheld from him."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 446

LEONARD GAMAGE, PETITIONER

v.

HAROLD BROWN, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 3–10) is reported at 377 F. 2d 154. The memorandum opinion of the United States District Court for the District of Columbia (Pet. App. 1–2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1967, and a petition for rehearing was denied on May 23, 1967. The petition for a writ of certiorari was filed on August 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

275-110—67——1

QUESTION PRESENTED

Whether, in a proceeding before an Air Force Board of Inquiry to determine whether an officer should be retained on active duty or honorably retired with full retirement pay, the Board may receive written statements of persons who are not available to testify and whose depositions the officer does not attempt to obtain.

STATUTE AND REGULATION INVOLVED

Section 8792(b) of Title 10 of the United States Code (Pet. App. 11) provides:

> A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.

Secton 18(c)(2) of Air Force Regulation 36–2 (Pet. App. 15) provides, in part:

> The use of affidavits or depositions to obtain testimony of witnesses who are not reasonably available is encouraged.

STATEMENT

Petitioner, a former Lieutenant Colonel in the Air Force, commenced this action by filing a complaint seeking to void respondent's decision to retire him from the active list of the Air Force honorably and with full retirement pay. In 1960, petitioner was relieved of his command of the Weather Detachment of the Military Air Transport Service at Mather Air Force Base, California, as a result of complaints that he had falsified official documents and was derelict in

his supervision of subordinate personnel (J.A. 112).[1] A Selection Board of general officers under 10 U.S.C. 8791 then recommended that he be required to show cause why he should be retained on active duty (J.A. 113–114). Pursuant to 10 U.S.C. 8792, a Board of Inquiry was convened to conduct a hearing on this issue. The Board of Inquiry found that petitioner's removal was justified; and this finding was affirmed by a Board of Review as provided for in 10 U.S.C. 8793 (J.A. 126, 127). Petitioner was then removed from the active list by the Secretary of the Air Force, under the authority granted by 10 U.S.C. 8794 (J.A. 128).

Several months prior to the hearing before the Board of Inquiry petitioner was informed of the charges against him and given his case file, which contained a summary of the evidence supporting those charges (J.A. 114–115). He was also given a list of the 48 persons whose names appeared in the file, along with their current addresses, for "assistance in contacting any potential witnesses for the purpose of obtaining depositions for the Board of Inquiry" (J.A. 116). Five of these persons had given affidavits adverse to petitioner's position, which affidavits were also contained in the case file (J.A. 119). Four of the affiants were no longer in military service; the fifth was stationed in England at the time of the hearing (J.A. 116).

Petitioner requested the Air Force to obtain the presence at the hearing of the four witnesses not then

[1] "J.A." references are to the joint appendix in the court of appeals.

in the service; the presence of the fifth witness was not requested (J.A. 118). The Air Force sent letters to each of the four witnesses asking them to appear at the hearing, but these requests were refused (J.A. 118–120). Petitioner was informed that the Air Force would not object to his use of depositions, affidavits, or sworn statements at the hearing (J.A. 118–119).

The hearing was transferred from Scott Air Force Base, Illinois, to Travis Air Force Base, California, at petitioner's request, and was postponed at least once when he requested extra time to take depositions and gather affidavits (J.A. 117). Petitioner did not attempt to depose any of the five adverse witnesses, and at no time was the Air Force requested to aid petitioner in obtaining depositions for use at the hearing (J.A. 118–120). At the hearing, the adverse affidavits were introduced over petitioner's objection, and eighteen witnesses gave live testimony (J.A. 119–120, 125). Prior to the conclusion of the hearing petitioner's counsel acknowledged that the Air Force "has done an excellent job, and has made a diligent effort * * * to procure the witnesses that * * * [petitioner] requested" (J.A. 125–126).

The Board of Inquiry found against the petitioner and the Board of Review affirmed (J.A. 126, 127). The Secretary then removed him from the active list (J.A. 128). The United States District Court for the District of Columbia granted petitioner's motion for summary judgment and declared the Secretary's action void. The court of appeals, in a unanimous opinion (Bazelon, C. J., and Edwards and Burger, JJ.), reversed.

ARGUMENT

1. Petitioner's principal contention is that by receiving in evidence the affidavits of five witnesses who were not present at the hearing, the Board of Inquiry deprived petitioner of the fair hearing required by 10 U.S.C. 8792(b). In construing that statutory standard, the court of appeals properly recognized (Pet. App. 8–9) that the proceedings before the Board are administrative, not criminal, that the only sanction imposed on petitioner was an honorable discharge with retirement pay, and that the rigid protection of the hearsay rule has not been thought to be fully applicable to administrative proceedings.[2] It is also relevant, as the court of appeals recognized, that Congress did not give the Board power to compel the presence of witnesses who are retired, inactive or discharged from military service. Against this background the court below properly concluded that it would not violate the statutory requirement of fairness for the Board to receive the affidavit of one not subject to subpoena.

Furthermore, in assessing the fairness of the proceedings, the court of appeals found that here, unlike *Greene* v. *McElroy*, 360 U.S. 474, petitioner "had

[2] See *Vitarelli* v. *Seaton*, 359 U.S. 535, 540; *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 44; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705–706. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886. Even in criminal proceedings exceptions to the hearsay rule are well known, under which statements of witnesses are admissible where no opportunity for cross-examination exists. See, *e.g.*, *Krulewitch* v. *United States*, 336 U.S. 440, 443–444 (out-of-court statement of co-conspirator); *Donnelly* v. *United States*, 228 U.S. 243, 273 (declaration against interest); *Mattox* v. *United States*, 146 U.S. 140, 151 (dying declaration).

procedural rights * * * which he knowingly failed to employ" (Pet. App. 9). Petitioner was given copies of the five affidavits well in advance of the hearings. When the four affiants whom petitioner wished to cross-examine declined to come to the hearing, petitioner never attempted to determine whether they would assent to having their depositions taken at locations convenient to them.[3] Petitioner now urges that it would have been futile to seek to take depositions (Pet. 20) and that it is "highly improbable" that the affiants would have agreed (Pet. 21). This is sheer speculation. Moreover, although the fifth affiant was still in the Air Force and could have been required to attend the hearing before the Board, petitioner never requested his presence. Under these circumstances, the court of appeals was plainly correct in concluding that petitioner failed to avail himself of "[i]mportant additional procedures for seeking a form of cross-examination of all five persons whose statements are the subject of this dispute" (Pet. App. 10).

2. Petitioner claims that the Air Force did not observe its own regulations (Pet. 21). Although the regulations gave petitioner the right to "question any witness *brought before* the board of inquiry,"[4] this would not seem to forbid the use of a statement of a person who cannot be brought before the board. On the contrary, the regulations explicitly encourage the "use of affidavits * * * to obtain testimony of wit-

[3] Two of the affiants lived in California, one in Texas and one in Wisconsin (J.A. 116).

[4] A.F.R. 36-2, § 17(d) (Pet. App. 14). (Emphasis added.)

nesses who are not reasonably available * * *."[5] Although the Air Force clearly stood ready to assist, petitioner did not request the presence of the one witness the Air Force could have compelled to attend and did not request the assistance of the Air Force in obtaining affidavits or depositions from the other four witnesses. We see no reason to doubt that the court of appeals rightly held that the Air Force Regulations were "followed explicitly" by the Board of Inquiry (Pet. App. 7).

3. Finally, there is no merit in petitioner's contention that, in reversing the district court, the court of appeals failed to heed the "clearly erroneous" standard of Rule 52(a), F.R.Civ. P. The rule is addressed to findings of fact in "actions tried upon the facts without a jury" and is inapplicable where, as here, the trial court disposes of the case upon motion for summary judgment. The district court did not make findings of fact; petitioner's motion for summary judgment was granted on the basis of stipulated facts, and in accordance with the district court's interpretation of the statute involved. We do not know of any case holding that a district judge's interpretation of a federal statute cannot be set aside unless clearly erroneous.

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[5] *Id.*, § 18 (c) (2) (Pet. App. 15).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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